No. 10-372

In The
Supreme Court of the United States

GREGORY FORRESTER,

Petitioner,

v.

STATE OF ARKANSAS,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Arkansas

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Under the Sixth or Fourteenth Amendment, does a defendant arrested and jailed for driving while intoxicated have a right to counsel or to contact counsel to aid in the collection of possibly exculpatory evidence prior to his release on citation pending sobriety some nine hours later and prior to an appearance before a judicial officer?

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OPINION BELOW

The State of Arkansas, the Respondent, opposes the petition of Gregory Forrester requesting a writ of certiorari to review the judgment of the Arkansas Supreme Court affirming his conviction for driving while intoxicated. *Forrester v. State*, 2010 Ark. 291, ___ S.W.3d ___.

JURISDICTION

While the Court may have discretionary jurisdiction pursuant to 28 U.S.C. §1257(a) to review a Sixth Amendment claim presented by the petition, the Respondent disputes that this Court has discretionary jurisdiction to review a distinct Sixth Amendment right-to-counsel attachment claim or any due-process claims under the Fourteenth Amendment because any such claims the Petitioner raises in his Question Presented are not properly before the Court under that statute.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the United States Constitution provides, in pertinent part, that "[i]n all criminal prosecutions, the accused shall . . . have the Assistance of Counsel for his defence."

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in pertinent

part, that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The Respondent relies on the description of the proceedings contained in the opinion below and incorporates that description by reference, Petitioner's Appendix ("Pet. Appx.") at 1-5, with the following additional comments concerning the Petitioner's recitation of the case. The rights of which the Petitioner was advised under the Arkansas Implied Consent Law are contained on a form initialed and signed by him which appears in the Respondent's Appendix. The Respondent disagrees with the Petitioner's description of his jailing as being held incommunicado. As the court below explained, he was held pending sobriety and release, not awaiting trial, making inapplicable the state criminal-procedure rules governing first appearances on which he in part relied below. Pet. Appx. at 4 & n.3.

REASONS FOR DENYING THE WRIT

What the Petitioner asks for – the right to contact an attorney to aid in the collection of exculpatory evidence shortly after (and certainly within a matter of hours of) his arrest and jailing for driving while

intoxicated (DWI) – is easy enough to gather from his petition. *E.g.*, Pet. at 7-8, 15, 18-19, 20-21. The Respondent, however, cannot readily discern what particular constitutional guarantee or doctrine the Petitioner believes compels such a right. For example, while both his Question Presented and Reasons for Granting the Writ invoke the Fifth and Sixth Amendments, the due-process clause of the former simply does not apply as against the Respondent. *See, e.g.*, *Dusenbery v. United States*, 534 U.S. 161, 167 (2002). Although, of course, the like clause of the Fourteenth Amendment does apply, *see id.*, the Arkansas Supreme Court did not reach and was not properly presented with a claim as to it. And, while a right-to-counsel claim under the Sixth Amendment may be presented, the petition by turns asks that it be decided as a matter of attachment of the right or as necessary to a critical stage of the criminal proceedings without regard to attachment. Moreover, the petition conflates the right to counsel with what appears to be a distinct due-process claim. Despite uncertainty in the petition, it should be denied as to either a due-process or a right-to-counsel claim under the Fourteenth and Sixth Amendments for the many reasons that follow.

1. The Petitioner's Right-To-Counsel Attachment And Due-Process Claims Were Not Decided By Or Properly Presented To The Arkansas Supreme Court.

"With very rare exceptions, [this Court has] adhered to the rule in reviewing state court judgments

under 28 U.S.C. § 1257 that [it] will not consider a petitioner's federal claim unless [the claim] was either addressed by, or properly presented to, the state court that rendered the decision [it] ha[s] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997) (per curiam) (citation and quotations omitted). In order to be properly presented to the state court, a federal claim must be presented "with fair precision and in due time[.]" *Id.*, 520 U.S. at 87 (citation and quotations omitted). The burden is on the Petitioner to show that his claims were properly presented to the Arkansas Supreme Court, *see*, *e.g.*, *id.*, 520 U.S. at 86; *see also* Supreme Court Rule 14.1(g)(i), and he has not met it here.

The Arkansas Supreme Court, relying on its own precedent from 25 years earlier, answered only the Sixth Amendment question whether the decision to submit to a breathalyzer test was a critical stage in the criminal proceedings which without counsel would risk derogation of a defendant's right to a fair trial. Pet. Appx. at 3-4. Pointing to that earlier case and its reliance on *United States v. Wade*, 388 U.S. 218 (1967), the Arkansas Supreme Court again concluded that there was no right to counsel at the time the Petitioner was offered a breathalyzer test. Pet. Appx. at 4. Thus, the Petitioner's request that the Court now hold that his right to counsel attached *after* he refused that test (at what he calls the conclusion of the initial police investigation) by "a specific expansion of the *Wade-Kirby* [*v. Illinois*, 406 U.S. 682 (1972)] cases under the Sixth Amendment[,]" Pet. at

8, simply was not decided by the Arkansas Supreme Court. To the contrary, that court concluded that the Petitioner offered no argument or authority as to prejudice from counsel's absence after he was jailed following his test refusal. Appx. at 4 & n.2. In other words, the court could not conclude that derogation of his right to a fair trial was at risk under *Wade* because his reliance on his test refusal to show prejudice was undeveloped. *Id.* In short, the Petitioner's claim that the Sixth Amendment right to counsel attaches in DWI cases at the conclusion of the so-called initial police investigation was not decided by the Arkansas Supreme Court.

Moreover, as this Court has recognized, Arkansas is one of the many states that provide for the appointment of counsel at least by an initial judicial appearance. *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 203-04 n.14 (2008). Here, as the Arkansas Supreme Court explained, however, no first appearance was held because the Petitioner was not jailed pending trial, but pending sobriety and release on citation, Appx. at 4 n.3, making it unnecessary that he appear before a judicial officer to advise him of any rights under Arkansas Rule of Criminal Procedure 8.3. Even if the Petitioner is correct that Arkansas law governing DWI prosecutions compelled his prosecution once he was arrested and cited for it as an equivalent to the initiation of adversarial judicial proceedings under *Wade* and *Kirby*, *see* Pet. at 8, the Arkansas Supreme Court certainly did not reach or decide the point as a matter of federal law

now subject to this Court's review, and this Court, of course, would not decide the matter of federal law on the vagaries of any one state's law. *See, e.g.*, *Rothgery*, 554 U.S. at 199 n.9 & 207. In any event, it is a less than certain proposition that Ark. Code Ann. §5-65-107 compels a commitment to prosecution in all conceivable circumstances as a matter of federal constitutional law, as judicial dismissal on motion may be appropriate in a given case. *See* Ark. A.G. Op. No. 1991-080.

The Petitioner's broader due-process claim to a right to obtain exculpatory evidence also was not reached by the Arkansas Supreme Court. That Court concluded that the Petitioner had made no request for an opportunity to collect such evidence, and it would not reach his various federal and state claims to a right to do so. Appx. at 4-5. The Petitioner's complaint with that resolution, Pet. at 16-17, comes too late in this Court. Had it any merit, he should have pursued it in a petition for rehearing before the Arkansas Supreme Court. In short, this Court cannot answer the question the petition appears to ask as a due-process matter because it was not properly presented to and decided by the Arkansas Supreme Court.[1]

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[1] Apart from falling outside the Court's jurisdiction under 28 U.S.C. §1257(a), the Petitioner's due-process claim mistakenly relies on the framework of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Pet. at 11-14. Given the substantial commitment to criminal trial protections in the Bill of Rights, the Court has rejected simply importing the *Mathews* analysis into

(Continued on following page)

2. The Petitioner's Critical-Stage Right-To-Counsel Claim Raises Neither An Important Constitutional Question Nor A Significant Lower Court Split Of Authority And Was Correctly Decided By The Arkansas Supreme Court.

This Court has settled for the Nation's lower courts that there is no Sixth Amendment right to counsel when a defendant is confronted with the decision whether to take a breathalyzer test by its dismissal of an appeal raising that question for want of a substantial federal question. *See Nyflot v. Minnesota Commissioner of Public Safety*, 474 U.S. 1027, 1027 (1985); *see also, e.g., Mandel v. Bradley*, 432 U.S. 173, 176 (1977) (per curiam) (observing that dismissals for want of a substantial federal question reject the specific challenge presented and prevent lower courts from coming to an opposite conclusion on the precise issue); *see generally* E. Gressman, K. Geller, S. Shapiro, T. Bishop, & E. Hartnett, *Supreme Court Practice* 306-10 (9th ed. 2007).

Perhaps recognizing as much, the Petitioner ultimately does not ask that the precise question settled for the lower courts by *Nyflot* be disturbed now. Rather, he asks the Court to find that a right to counsel exists a short time later because, as he posits, the decision below has made the split of lower court

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criminal-procedure settings, *see, e.g., Medina v. California*, 505 U.S. 437, 442-44 (1992), and the Petitioner provides no compelling reason for the Court to do so here.

authority suggested by the dissenters in *Nyflot* worse "by not allowing the right to counsel even after the police investigation has concluded." Pet. at 19.[2] Thus, even while pointing to *Nyflot* as authority for a split in the lower courts, he persists in asking the Court for a different rule – "that after the initial police investigation is concluded [*after* his breathalyzer refusal here], the arrested person should have a reasonable opportunity to contact his attorney so that the attorney could arrange for the collection of any exculpatory evidence, and to provide any necessary legal advice and assistance." Pet. at 20-21. As explained, *supra*, such a ruling founded in either a right-to-counsel attachment claim or any due-process claim was not decided by the Arkansas Supreme Court. Any such ruling founded on a critical-stage right-to-counsel claim can hardly be decided without first "extend[ing] the right to counsel to a point earlier than formal judicial proceedings[,]" which the Court previously has rejected doing. *Rothgery*, 554 U.S. at 209 (citing *United States v. Gouveia*, 467 U.S. 180 (1984)); *see also id.* at 211-12 & nn.15 & 16 (noting that attachment and right to postattachment presence of counsel at critical stages are different enquiries and describing several of latter).

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[2] The suggestion that the Petitioner was denied counsel indefinitely after the police investigation concluded is hyperbolic. As explained, *supra*, Arkansas by court rule provides for the appointment of counsel by the requirement of a prompt first appearance, which was obviated in the Petitioner's case given his release on citation nine hours after his DWI arrest.

Even if the Court concluded that the petition raised the precise question from *Nyflot*, it should be denied. Contrary to making anything worse, as the Petitioner claims, the court below was correct, as it was 25 years before, that the want of Sixth Amendment counsel after a DWI arrest until release on citation a short time later (here nine hours) does not risk derogation of a later fair trial. A decision *consistent* with *Nyflot* hardly changes the status quo ante as to any split identified in the lower courts when *Nyflot* was decided. Indeed, the petition identifies only two states with cases decided after *Nyflot* reaching a contrary result. Moreover, the one upon which he "is relying most heavily," Pet. at 11, *State v. Carr*, 128 Idaho 181, 911 P.2d 774 (Idaho Ct. App. 1995), wrongly employs *Mathews* to resolve the question as a due-process matter. Pet. at 11-12. And, in any event, the Idaho Supreme Court's later opinion in *State v. Harmon*, 131 Idaho 80, 86-87, 952 P.2d 402, 408-09 (1998), recognized that there is no Sixth Amendment right to counsel before a blood-alcohol test is administered. In the end, the Petitioner points only to a decision of the Arizona Court of Appeals to pad the minor split suggested by the *Nyflot* dissent. Pet. at 18. That court, however, since has held that the Sixth Amendment does not entitle an alleged drunk driver to counsel at the time of his or her initial appearance, while he or she is in the sheriff's custody, or when he or she is being readied for the initial appearance. *State v. Weiss*, 232 P.3d 1259, 1262 (Ariz. App. 2010). In any event, any alleged disagreement between the decision in this case and the decisions of intermediate

state appellate courts, does not merit this Court's review. *Cf.* Supreme Court Rule 10(b) (conflict between state courts of last resort and United States court of appeals as among characteristics considered by Court for discretionary review).

The Respondent's research reveals that, in decisions since *Nyflot*, the states almost universally agree that there is no Sixth Amendment right to counsel before a suspect takes a breathalyzer test and that any right to counsel at an earlier point in time derives from state law, and not the Sixth Amendment. For a typical instance, in *Porter v. State*, 732 So.2d 899, 904 (Miss. 1999), the Mississippi Supreme Court noted that the Sixth Amendment right to counsel attaches once the state begins criminal proceedings, but it held that the right to counsel under Mississippi law attaches earlier, when the proceedings reach "the accusatory stage," defined as occurring when a warrant is issued or by binding over or compelling the accused to answer the offense. Similarly, in Oregon, an accused drunk driver's right to counsel before deciding whether to submit to a breathalyzer test is based on that state's constitution, rather than the Sixth Amendment. *State v. Dumford*, 149 Or. App. 1, 5, 941 P.2d 1042, 1044-45 (1997). *Accord State v. Koppi*, 779 N.W.2d 562, 569 (Minn. App. 2010); *State v. Delisle*, 137 N.H. 549, 551-52, 630 A.2d 767, 768 (1993); *State v. Berger*, 623 N.W.2d 25, 30 (N.D. 2001). In short, the *Nyflot* question remains insubstantial and the lower courts largely resolve the issue as a matter of state law and do not need a Sixth

Amendment course correction from this Court. The majority view adopted by Arkansas is correct, and any divergence of lower court authority on the question does not represent a wide split on an important question of federal constitutional law.[3]

Finally, the Arkansas Supreme Court was correct that the Petitioner's right to a fair trial was not at risk of derogation under the Sixth Amendment for the want of counsel when he was confronted with the decision whether to take a breathalyzer test following his DWI arrest. Indeed, he was advised by the arresting officer that his refusal to submit to a breathalyzer test would result in the suspension of his driving

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[3] The petition discusses several state-court decisions, not apparently in support of a split of authority but to suggest fault by the court below for not distinguishing them. Pet. at 10-11. Although that discussion's failure to demonstrate a reason to grant the petition merits no further response, its reliance on two authorities briefly does. As he did in the court below, the Petitioner relies on *State v. Hill*, 277 N.C. 547, 178 S.E.2d 462 (1971), and *City of Tacoma v. Heater*, 67 Wash.2d 733, 409 P.2d 867 (1966), but the issue has been revisited in both states. In North Carolina, the state legislature responded to *Hill* by statutorily changing its "*per se* prejudice" rule to provide that denial of access to counsel was "no longer inherently prejudicial to a defendant's ability to gather evidence in support of his innocence in every driving while impaired case." *State v. Knoll*, 322 N.C. 535, 545, 369 S.E.2d 558, 564 (1988). The North Carolina state legislature, obviously, would have no authority to change a right guaranteed by the Sixth Amendment. In *Prok v. State*, 107 Wash.2d 153, 155-56, 727 P.2d 652, 654 (1986), the Washington Supreme Court explained that the right to counsel accruing when a person is taken into custody is based on that state's criminal-procedure rules.

privilege and that if he took the test he could pay for an alternative test of his own, and he initialed and signed a form indicating he was so advised. *See* Respondent's Appx. A1. To conclude that the Petitioner was entitled to counsel at that time (or even during the nine hours he was jailed until his release on citation, as he asks in his proposed rule) would require rejection of the long-settled view that the Sixth Amendment right to counsel for the accused's defense "means defense at trial, not defense in relation to other objectives that may be important to the accused." *Rothgery*, 544 U.S. at 216 (Alito, J., concurring) (citing *Gouveia*).

Moreover, concluding that the right to counsel so existed only for DWI cases – or only as to blood-alcohol-content testing – is an especially dubious proposition. It would be passing strange that, while the collection of such evidence or evidence of the refusal to permit its collection infringes neither an accused's Fourth nor Fifth Amendment rights, *see Schmerber v. California*, 384 U.S. 757 (1966), *South Dakota v. Neville*, 459 U.S. 553 (1983), the decision confronting the accused as to its collection nevertheless requires the advice of Sixth Amendment counsel.

CONCLUSION

The petition for a writ of certiorari to the Arkansas Supreme Court should be denied.

Respectfully submitted,

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APPENDIX
STATE'S EXHIBIT 1

A1

NAME GREGORY FORRESTER
DL# 919495001
DOB 1/7/68
DATE 12/1/07
TIME OF INCIDENT 0008

STATE'S EXHIBIT

[CR08-789-1]

Any person who operates a motor vehicle or who is in actual physical control of a motor vehicle in this state shall be deemed to have given consent to a chemical test or tests of his or her blood, breath or urine, for the purpose of determining the presence and amount of alcohol, controlled substance, or any other intoxicant.

1. GF If you refuse to take the test or tests, **none will be given**, but you will be in violation of Arkansas Code Annotated §5-65-205, Refusal to Submit, and your driving privilege will be suspended or revoked pursuant to Arkansas Code Annotated §5-65-402.

2. GF If you choose to take the test or tests, and the results reflect an alcohol concentration of eight hundredths (.08) or more, or the presence of a controlled substance, or any other intoxicant, your driving privilege will be revoked or suspended pursuant to Arkansas Code Annotated §5-65-104.

3. ____ If you choose to take the test or tests, and the results reflect an alcohol concentration of four hundredths (.04) or more or the presence of a controlled substance, or any other intoxicant for a violation occurring in a commercial vehicle, OR the results reflect an alcohol concentration of eight hundredths

(.08) or more, or the presence of a controlled substance or any other intoxicant for a violation occurring in a non-commercial vehicle, your commercial driving privilege will be disqualified pursuant to Arkansas Code Annotated §27-23-112.

DUI

4. _____ If you are under age 21 and you refuse to take the test or tests, **none will be given**, but you will be in violation of Arkansas Code Annotated §5-65-310, and your driving privilege will be suspended pursuant to Arkansas Code Annotated §5-65-310.

5. _____ If you choose to take the test or tests, and you are under age 21 and the results reflect an alcohol concentration of two hundredths (.02) but less than eight hundredths (.08), your driving privilege will be suspended or revoked pursuant to Arkansas Code Annotated §5-65-304.

If you take the test or tests requested by law enforcement, you may also, at your own expense, have a physician, registered nurse, lab technician, or other qualified person administer an additional breath, blood, or urine test. This department will assist you in obtaining such a test. Pursuant to Act 561 of 2001, if you choose to have an additional test, and are later found "**Not Guilty**" of violation of the Omnibus DWI Act, for this arrest, the arresting law enforcement agency will reimburse you for the cost of the additional test.

DO YOU UNDERSTAND ALL PARTS OF THESE RIGHTS? ✓ YES _____ NO

WILL YOU TAKE THE TEST/ TESTS? _____ YES ✓ NO

Observation time beginning:
_____ (am / pm)

Time of test:
_____ (am / pm)

DO YOU WANT ANOTHER TEST AT YOUR EXPENSE? _____ YES _____ NO

(Breath, Blood, Urine) Time of test _____ (am / pm)

/s/ Greg Forrester
Signature of Subject

/s/ [Illegible] #1603
Signature of Officer

12/1/07 0053
Time

/s/ _____
Signature of Witness